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No. 84-1345

In the Supreme Court of the United States

OCTOBER TERM, 1984

TOWN PUMP, INCORPORATED, PETITIONER

v.

SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner challenges the court of appeals' determination that the operators of petitioner's gasoline service stations are employees within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

1. Petitioner Town Pump, Incorporated (Town Pump) is a Montana corporation owned by its president and members of his immediate family (Pet. 2). Petitioner has been engaged since May 1, 1975 in the business of distributing gasoline and petroleum products to 56 self-service gasoline stations, generally known as "Town Pump" service stations (Pet. App. A12). All of these stations are owned by petitioner or by other corporations that are owned by

petitioner's president and members of his immediate family (*ibid.*; Pet. 2).

Fifty-four Town Pump stations are operated pursuant to substantially similar lease agreements in which petitioner is the named "lessor" (Pet. App. A13, A21). The lease agreements purport to lease to the operator a Town Pump service station, together with the attached living quarters, at a monthly rental of one cent per gallon of gasoline delivered to the station by Town Pump (*id.* at A13). Petitioner holds all of the stations' necessary business licenses and petroleum allocations in its own name (*id.* at A16, A17, A19). It is the exclusive distributor of gasoline and petroleum products for each station, and it determines the retail price at which the products are sold (*id.* at A14, A18, A19, A20, A23, A25). Moreover, the Town Pump service stations are similar in appearance and function, and are operated in a similar manner pursuant to instructions and advice from Town Pump representatives (*ibid.*).

The stations are open seven days a week, for approximately 15 hours per day (Pet. App. A14, A16, A17, A18, A20, A21). The station operators complete daily reports on forms provided by petitioner, and make daily deposits to bank accounts belonging to petitioner (*id.* at A14, A18, A21). The operators withhold their commission of one cent per gallon from the last daily deposit for each week, and account for the commission on a weekly report completed on a Town Pump form. The form requires the station operators to balance the amount owed to petitioner (the retail sales less the operator's commission) against their total deposits for each week. *Id.* at A14, A16, A18, A23, A25. The operators are responsible for any shortages, and for bad checks or other losses (*id.* at A15, A17, A19).

The lease agreements provide that the operators are independent contractors and not agents or employees of petitioner (Pet. App. A5, A13). The agreements permit the operators to engage in other businesses on the leased premises, and some operators do engage in such businesses (*id.* at A5).

2. The Secretary of Labor commenced this action in the United States District Court for the District of Montana to enjoin petitioner from violating the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) and to compel payment of back wages to the operators (Pet. App. A12). The testimony of six operators was submitted at a trial on June 17, 1980, together with numerous documentary exhibits, including the lease agreements of six non-testifying operators (*id.* at A8). On October 6, 1981, the district court issued a memorandum opinion, together with 69 findings of fact and 37 conclusions of law (*id.* at A7-A30). The court found that the operators had been employees of petitioner since January 1, 1977, and were subject to the minimum wage and overtime provisions of the FLSA (*id.* at A29-A30). The court entered judgment in favor of the Secretary restraining petitioner from violating Sections 15(a)(2) and (5) of the FLSA, 29 U.S.C. 215 (a)(2) and (5), and requiring petitioner to pay minimum wage and overtime compensation owed to the six employees who had testified at the trial (Pet. App. A30). The court declined to enter back pay awards for the remaining operators in the absence of testimony regarding the hours worked by the operators (*id.* at A9, A29).

Fifty-one operators testified in September 1982, as did Town Pump management employees and expert witnesses. On September 28, 1983, the district

court issued a memorandum opinion (*id.* at A3-A6). The court reversed its previous position, holding that the degree of supervision exercised by petitioner over the operators' hours and other business activities was insufficient to indicate an employer-employee relationship (*id.* at A4-A5). It found that "the relationship between the operators and the defendant was that of independent contractors" (*id.* at A4). The court entered judgment for petitioner as to all of the operators, including the six operators who had testified at the first trial (*id.* at A6).

The court of appeals reversed (Pet. App. A1-A2). It found that "the district court erred in failing to consider significant factors in its determination that the operators are not employees under the Fair Labor Standards Act" (*id.* at A1). In particular, the court of appeals concluded that the district court should not have made its determination solely on the basis of "Town Pump's lack of supervision of the operators and the fact that the operators were free to engage in other business at the stations" (*id.* at A1-A2). The court of appeals found it unnecessary to remand the case for further factual findings "because the district court's detailed findings of fact, made after the first trial, are sufficient for us to rule on the issue" (*id.* at A2). The court of appeals reviewed the characteristics of the relationship between petitioner and the station operators and concluded that "[t]he record is sufficient for us to hold that the operators considered by the district court are employees" (*ibid.*).

3. The decision of the court of appeals involves the application of well-settled legal principles to the particular facts of this case. It does not conflict with any decision of this Court or any decision of another court of appeals. Further review of this fact-bound issue is not warranted.

Moreover, the decision of the court of appeals is correct. Petitioner's principal contention (Pet. 10-13) is that the court of appeals acted as "an original fact finding tribunal" (*id.* at 13) in concluding that the service station operators were employees within the meaning of the FLSA. However, the court of appeals did not engage in fact finding; it simply applied the appropriate legal standard to the facts found by the district court.

Petitioner has confused the two different types of determinations made by the district court. That court first detailed its findings concerning the factual circumstances of the relationship between petitioner and the service station operators (see Pet. App. A4-A5, A12-A22). It then measured these facts against the FLSA's legal standard in order to determine whether the operators were "employees" within the meaning of the statute (*id.* at A5, A8, A24-A27). While the district court's findings regarding the facts underlying a determination of employment status are subject to review under the clearly erroneous standard (see Fed. R. Civ. P. 52(a)), the courts of appeals are in agreement that the determination whether an employee relationship exists is a question of law. *Donovan* v. *Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984); *Donovan* v. *Trans World Airlines, Inc.*, 726 F.2d 415, 417 (8th Cir. 1984); *Castillo* v. *Givens*, 704 F.2d 181, 185-188 (5th Cir. 1983), cert. denied, No. 83-135 (Oct. 3, 1983); *Bonnette* v. *California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983); *Donovan* v. *New Floridian Hotel, Inc.*, 676 F.2d 468, 471 n.4 (11th Cir. 1982).[1]

[1] In view of this unanimity among the courts of appeals, there is no basis for petitioner's assertion (Pet. 16-17) that this Court should address the standard of review applicable to this determination.

The court below followed this rule in reviewing the district court's determination. It did not disturb the district court's factual findings concerning the characteristics of the relationship between Town Pump and the operators.[2] It simply held that the district court had committed an error in its application of the FLSA's legal standard and, because the relevant facts were in the record,[3] the court of appeals proceeded to apply the legal test in a proper manner.

This Court has made clear that the determination whether a person is an "employee" under the FLSA depends not on "isolated factors but rather upon the circumstances of the whole activity." *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730 (1947). Thus, the court of appeals correctly held (Pet. App. A1-A2) that the district court erred by making its determination solely on the basis of the degree of petitioner's control over the operators' hours and the operators' freedom to engage in other businesses. See *Mednick* v. *Albert Enterprises, Inc.*, 508 F.2d 297, 299-301 (5th Cir. 1975) (these factors not determinative because even individual who hires own employees and engages in other activities to increase compensation can be an employee under the FLSA).

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[2] Petitioner's suggestion (Pet. 18-19) that the decision of the court below conflicts with *Donovan* v. *Brandel*, 736 F.2d 1114 (6th Cir. 1984), therefore is incorrect.

[3] Petitioner argues (Pet. 7-9) that the court of appeals should not have relied upon the district court's initial findings of fact. However, the district court did not vacate its initial findings; it simply "re-examined" them (Pet. App. A4), made some additional findings (*id.* at A4-A5), and reached a different legal conclusion. Thus, the earlier findings remain valid provided they are not contradicted by factual findings in the later decision.

The court of appeals properly concluded that the operators were employees within the meaning of the FLSA based upon its more complete review of the characteristics of the operators' relationship with petitioner. The court of appeals relied (Pet. App. A2) upon the district court's findings "that the operators have no investment in the gasoline business, that the operators remain on the job as long as they continue to meet the requirements set by Town Pump, that the operators' retail sale of gasoline is an integrated part of Town Pump's business, and that the operators are dependent upon Town Pump for continued employment." See also Pet. App. A26-A27. Its determination is in accord with the decisions of other courts of appeals that cite similar factors in finding that the operators of retail stations were employees under the FLSA. See *Donovan* v. *Williams Oil Co.*, 717 F.2d 503, 504-505 (10th Cir. 1983); *Marshall* v. *Truman Arnold Distributing Co.*, 640 F.2d 906, 908-909 (8th Cir. 1981); *Usery* v. *Pilgrim Equipment Co.*, 527 F.2d 1308, 1310-1315 (5th Cir.), cert. denied, 429 U.S. 826 (1976).[4]

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[4] Petitioner erroneously asserts (Pet. 13-15) that the court of appeals was required to make a separate determination concerning the employee status of each service station operator. It is clear that a single determination can be made with respect to a group of similarly situated employees. See, *e.g.*, *Donovan* v. *Williams Oil Co.*, *supra*; *Marshall* v. *Truman Arnold Distributing Co.*, *supra*; *Usery* v. *Pilgrim Equipment Co.*, *supra*.

Petitioner suggests (Pet. 16-19) that this Court should reevaluate its decision in *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947), and establish a more specific test for ascertaining employee status under the FLSA. However, petitioner has presented no conflict among the courts of appeals warranting resolution by this Court. Moreover, the

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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limitless variety of factual situations in which this issue can arise would render impractical any standard other than the "circumstances of the whole activity" test set forth in *Rutherford Food Corp.*

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